Interpreting uniform laws – the Norwegian perspective

as illustrated by the Hague Rules, enacted into domestic law by the Norwegian Maritime Code 1994

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AS ILLUSTRATED BY THE HAGUE RULES

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1. INTRODUCTION

The topic of this thesis is the interpretation of domestic legal provisions that enacts uniform laws, from a Norwegian perspective.

Uniform laws are international conventions where the signatory states agree on a uniform text that is to regulate a given private law subject with the purpose of achieving uniform legislation in all contracting states, i.e. international uniformity. Once the convention text has been agreed, it is enacted into the domestic law of each signatory state. These conventions (hereafter “uniform laws”) are especially prevalent in private law matters that operate in a largely international sphere, such as transportation law.

In an increasingly globalised world a growing number of legal matters take place in the international sphere and the need for uniform laws is no longer reserved for transportation law. The latter half of the 20th-century saw the formation of a number of uniform laws within international commerce, be it international sale of goods, international commercial contracts or international arbitration. Further, in terms of international trade, after the breakdown of the Doha Round in 2008, economists such as the former Dean of Harvard and U.S. Treasury Secretary, Larry Summers, has recently argued that uniform laws may prove more effective in achieving a fairer international marketplace than the large and wide-reaching trade agreements that have dominated the political landscape so far. Additionally, typical private law areas such as family law have become subject to uniform laws as people themselves increasingly move between jurisdictions.

Given the increased significance of uniform laws it is important to look closer at how these conventions should be approached. Are there characteristics to these uniform laws, or ra-

\[1\] Summers (2016)
ther the domestic provisions that enact them, that entail that they should be construed differently than other parts of domestic law?

The central ambition of this paper is to draw up the framework applicable to the interpretation of uniform laws. The interpretative approach set out is in essence a consensus driven, purposive approach. It is rooted in the fundamental purpose of international uniformity and utilises the common sources off all signatory states – the convention text itself and its legislative history – as well as case law from other signatory jurisdictions, even where such an approach entails the disregard of domestic law.

As will be seen from the discussion below such an approach to uniform laws has broad international acceptance.

In Norway, there has traditionally been no emphasis on the interpretative approach to uniform laws. Instead, uniform law provisions have usually been subjected to the same methods of interpretation as other domestic legislation, which primarily entails an interpretation of the wording of the provision, the domestic travaux préparatoires, domestic case law and legal theory.

There is currently no Norwegian Supreme Court decision that expressly considers how the interpretation of uniform laws should be approached. There are however recent signs (albeit small) of a more conscious approach to uniform law interpretation in the lower courts. Similarly, the issue has received modest consideration in both preparatory works and legal theory. The last full treatment of the issue was done by Lødrup in 1966\(^2\), followed by a shorter article by Oftedal Broch in 1968\(^3\). In the nearly half a century since, there has been significant developments in the law both at home and abroad that renders the issue ripe for a renewed treatment.

\(^2\) Lødrup (1966) pp. 69-104
\(^3\) Oftedal Broch (1968)
The discussion on uniform laws will be structured in two parts; the first part considers the *formation* of uniform laws and the second part discusses the *interpretation* of uniform laws.

The first part, on formation, gives an overview of the purpose and process that leads to an international uniform law convention in chapter 2, before considering how the uniform law is enacted domestically into Norwegian law in chapter 3. As will be seen in the second part on interpretation, the formation of a uniform law – its legislative history – may have a significant impact on the subsequent interpretation of the uniform law.

The second, and predominant, part of this thesis considers the interpretation of uniform laws and is structured around the following three elements of interpretation:

(i) The significance of the domestic enactment of the uniform law, which will be discussed in chapter 4.

(ii) The use of the original convention text and *travaux préparatoires*, which will be discussed in chapter 5.

(iii) The consideration and weight of case law from other jurisdictions, which will be discussed in chapter 6.

The absence of Norwegian law addressing the issue renders it necessary to explore any legal basis for such an approach in Norwegian law. From a Norwegian perspective three fundamental grounds may give rise to a purposive interpretation of uniform laws, aimed at international consensus:

(i) The Norwegian customary law principle oft described as the *presumption principle* which states that there is a presumption that the Norwegian legislature passes domestic law in accordance with Norway’s international law obligations.
The presumption principle is of particular relevance in considering the relative weight of the domestic enactment of a uniform law and will be discussed in chapter 4 which considers any bearing the domestic enactment of a uniform law may have on its interpretation. The presumption principle does however extend further and will be revisited in regards to both the use of the original convention text (chapter 5) and case law from other jurisdictions (chapter 6).

(ii) *Customary international law* principles on the interpretation of treaties, as codified in the Vienna Convention on the Law of Treaties 1969 (“the Vienna Convention”) articles 31 to 33. Whilst Norway has not ratified the Vienna Convention, the Norwegian Supreme Court has recognised articles 31 to 33 as codifying existing customary international law binding upon Norwegian courts.

These principles relate primarily to the use of the original convention text and its legislative history and will therefore be considered in conjunction with the discussion in chapter 5 on the use of the original convention text and its legislative history.

(iii) That the approach of supreme courts in other jurisdictions, in that interpretation – in the interest of uniformity – should not be rigidly controlled by domestic precedents but rather general and internationally accepted principles, is evidence of *an implied obligation* in the convention to the same effect. This is of particular importance in terms of chapter 6 which considers the weight of case law from other signatory jurisdictions.

To render the discussion more tangible I have chosen to illustrate the interpretation of uniform laws by reference to the International Convention for the Unification of Certain Rules
The Hague Rules is a central uniform law in maritime law that, in essence, regulates liability for cargo damage.

Under the Hague Rules, a carrier of cargo by sea will – as a general rule – be liable for damage caused to the cargo whilst in his custody, unless the carrier can show that the damage was not caused by his negligence. A significant exemption to this general rule is the so called *nautical fault exemption*. The exemption provides that where damage to the cargo is a result of an act or omission of the master or crew in the navigation or management of the ship, the carrier will be exempt from liability regardless of negligence.

I will primarily rely on the Hague Rules’ nautical fault exemption – which is provided in the Hague Rules article IV rule 2(a) – and its Norwegian enactment – provided in the Norwegian Maritime Code 1994 (hereafter “the NMC”) § 276 – when discussing the interpretation of uniform laws.

The reasons for utilising the Hague Rules and its nautical fault exemption when discussing the interpretation of uniform laws are many. Primarily the Hague Rules is a (relatively) old uniform law which has been the subject of much debate and considerable litigation the world over, for no provision of the Rules is this more true than for the nautical fault exemption. Further, the history of Hague Rules provides a representative illustration of the purpose and formation of uniform laws. Furthermore, the Rules has arguably proved to be a successful uniform law with a broad following amongst states and private parties alike.

4 The convention is, in Scandinavian sources, more often referred to as “the Hague-Visby Rules” (”Visby” referring to the 1968 amendment to the Convention negotiated in Visby, Sweden). As the Visby amendment has no relevance to nautical fault and this thesis frequently cites case law that pre-dates the Visby amendment and the Visby amendment not having been ratified by the United States; “the Hague Rules” or “the Rules” are used throughout the thesis to harmonise the wording with that contained in the cited case law and literature.

5 The Rules have been adopted, with the exception of China, by all major maritime nations.

6 I am referring here to the widespread use of so-called *paramount*-clauses ensuring the application of the Hague Rules to charter parties, cf. *Granville*, and bills of lading issued under a charter party.
In addition, the current and previous domestic enactments of the Rules into Norwegian law provides a good basis for contrasting the relationship, relevant to all uniform laws, between an international obligation and its domestic enactment. The reason being that there are clear differences in wording and structure between the Norwegian enactment and the Hague Rules themselves. Such differences may shed light on Norway’s obligation under uniforms laws both in terms of enactment by the legislature and interpretation by the courts.

PART I – FORMATION

2. THE INTERNATIONAL FORMATION OF A UNIFORM LAW

2.1 Introduction

Before turning to the interpretative approach in construing uniform laws, a closer look at the reasons and process behind the creation of uniform laws is in order. The formation of uniform laws are important not only because the specific legislative history of each uniform law is relevant upon their interpretation, but because the underlying rational of uniform laws forms the basis upon which the interpretative approach rests. Accordingly, it is the rational of uniform laws rather than specific history that this chapter seeks to illustrate.

2.2 The reason and purpose (the pre-Hague law on cargo damage)

As was highlighted in the introduction, the prevalence of uniform laws is found in areas of laws that operate in the international sphere (meaning: between two or more jurisdictions). The reason being that once a legal dispute arises in the international sphere the key issue that occur is: in which of the jurisdictions should the dispute be resolved? If the law in the
jurisdictions are different in relation to the matter at hand, the parties will invariably seek to have the dispute heard in the jurisdiction most beneficial to them.\(^7\) This is usually referred to as “forum shopping” and is determined by the conflict of laws in the respective jurisdictions.

The combination of differences in law and forum shopping may result in uncertainty, the exploitation of imbalances in contractual strength\(^8\) and costly litigation for the involved parties. As follows, it is detrimental to business efficacy within industries that largely operate in the international sphere.

The problem may be solved however if the substantive law applicable to the legal dispute is the same in both/all jurisdictions. If the law is the same, i.e. uniform, there is reduced uncertainty and no incentive for forum shopping.

The law relating to cargo damage at sea provides an illustrative example of the need for uniform legislation.

By the mid-19th century a default rule had developed in both common law\(^9\) and civil law jurisdictions\(^10\) to the effect that a carrier of cargo by sea was liable for damage to the cargo whilst in his care, regardless of fault\(^11\). This unless the carrier could prove that the loss was caused solely by certain excepted causes: act of God, act of public enemies, shipper’s fault or inherent vice of the goods\(^12\). Unsurprisingly, carriers found this near strict liability for cargo damage onerous.

\(^7\) See also Ofedal Broch (1968) p. 595.
\(^8\) E.g. Falkanger (2016) p. 279
\(^9\) Although the carrier’s absolute liability for cargo damage in common law goes as far back as the 14th century, cf. Beale (1898).
\(^10\) Sturley (1991) p. 4
\(^11\) Ibid.
\(^12\) Ibid.
In order to avoid the very stringent liability laws, the carriers included clauses in their bills of lading exempting them from liability for cargo damage, in particular so-called “negligence clauses” – clauses that exempted the carrier from liability even where a loss was caused by the carrier’s own negligence.\(^{13}\)

It was the respective jurisdictions approach to these negligence clauses – whether or not they accepted them – that caused international uncertainty. The Atlantic trade was particularly affected due to the discourse between English and U.S. courts. The 1889 decision of the English Court of Appeal in *Re Missouri*\(^{14}\) is a good example. *The Missouri* stranded due to the master’s negligence on a voyage from Boston to Liverpool loaded with cattle. The contract for carriage included the clause:

> “Ship not accountable for... loss or damage... whether arising from the negligence, default, or error in judgment of the master... or others of the crew,”\(^{15}\)

Under English law the courts allowed such clauses in deference to contractual freedom. In Massachusetts, U.S. (the alternative jurisdiction) however, such clauses were deemed contrary to public policy.\(^{16}\) The case before the Court of Appeal accordingly turned on whether the case fell under English or American jurisdiction. The court held the contract to be governed by English law and found the carrier not liable for the cargo owner’s loss.\(^{17}\)

Not only did the different approaches in England and the U.S. give rise to uncertainty, it also allowed for what some consider the carrier’s exploitation of the relative bargaining strength of the parties\(^{18}\) in that the (American) producers/cargo owners were wholly de-

\(^{13}\) See *Re Missouri* (1889) 42 Ch. D. 321 discussed below.

\(^{14}\) *Ibid.*

\(^{15}\) *Ibid.*

\(^{16}\) As set out in *ibid.* at p. 322

\(^{17}\) As per Lord Halsbury LC on page 336 and 337. An example of a Norwegian negligence clause to the same effect can be seen in *D/S Atma* (Rt. 1929 p. 1081 at 1084).

\(^{18}\) See Falkanger (2011) p. 277
dependent on (British) shipowners/carriers to get their products to overseas markets, this dependence enabled the carriers’ imposition of unreasonable negligence clauses.

It was this conflict that created the desire for international uniform legislation on cargo damage.\(^\text{19}\)

### 2.3 The solution and compromise (the Hague Rules)

In order to achieve uniformity between the different jurisdictions, the states must agree on what the uniform law is to be, a compromise. Normally this is done by agreeing on a convention text that is to regulate the given issue (in relation to the Hague Rules, cargo damage under bills of lading) in all jurisdictions.\(^\text{20}\)

The negotiation and conclusion of a uniform law may be done through international institutions such as the UNIDROIT\(^\text{21}\), set conferences such as the Hague Conference on Private International Law or ad hoc diplomatic conferences\(^\text{22}\). The Hague Rules were a result of the latter. As the Rules illustrates, the process leading to a uniform law may entail more than the negotiations directly preceding the conclusion of the uniform law.

In response to the carriers’ negligence clauses and their allowance by English and other European courts\(^\text{23}\), the United States, led by strong cargo interests\(^\text{24}\), enacted the Harter Act

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\(^\text{19}\) Sturley (1991) p. 6
\(^\text{20}\) Another, but less usual, method is close collaboration in legislation drafting. The Nordic law collaboration is an example of such a means of uniformity. It is less formal and not binding as a uniform law per se, see 6.5 below.
\(^\text{21}\) Not all of UNIDROIT’s work is or results in uniform laws. For instance model laws share many features with uniform laws, but they are voluntary and not anchored in a convention (i.e. not binding on states) like uniform laws. The arguably most prominent UNIDROIT uniform law is the CMR (the Convention on Contracts for the International carriage of Goods by Road 1956).
\(^\text{22}\) NOU 1972:16 p. 9
\(^\text{23}\) Sturley (1991) p. 5; footnote 15 above.
\(^\text{24}\) The act’s namesake, Rep. Michael Harter, himself represented Ohio which was dominated by grain and flour producers dependent on shipowners to carry their produce to overseas markets.
in 1893. The Harter Act subjected bills of lading in international trade, i.e. to and from ports of the United States, to mandatory legislation that expressly prohibited negligence clauses\(^{25}\) and rendered the carrier liable for cargo damage in all but certain exempted cases, hereunder nautical fault, but then only if the carrier had exercised due diligence in making the ship seaworthy\(^{26}\).

By 1920 further jurisdictions had passed Harter-style legislation\(^{27}\) and several more had indicated they were considering doing the same\(^{28}\). The main resistance to such legislation was in England, dominated by shipowner interest\(^{29}\). But by 1920 internal pressures in the British Empire (Australia, New Zealand and Canada were dominated by cargo interests) had put the English shipowners on the defensive\(^{30}\). Under the prospect of being subjected to Harter legislation even in their home jurisdiction, the British shipowners instanced\(^{31}\) the series of ad hoc British and international conferences that ultimately led to the Hague Rules being signed in Brussels in 1924\(^{32}\).

In the convention\(^{33}\) that resulted from the negotiations was a concession by the shipowners in relinquishing their ability to contract out of liability through negligence clauses. They were however not willing to return to the original default risk allocation which entailed near strict liability for cargo damage\(^{34}\). The shipowners instead accepted liability caused by his own negligence or that of his servants in the due diligence to make the ship seaworthy,

\begin{itemize}
  \item \(^{25}\) The Harter Act 1893 § 1.
  \item \(^{26}\) The Harter Act 1893 § 3; see also Sturley (1991) p. 14.
  \item \(^{27}\) Sturley (1991) p. 15-18
  \item \(^{28}\) Ibid. at 17
  \item \(^{29}\) Ibid. at 19
  \item \(^{30}\) Ibid. at 18 et seq.
  \item \(^{31}\) Ibid. at 19
  \item \(^{32}\) Ibid. at 20-32
  \item \(^{33}\) The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924.
  \item \(^{34}\) See 2.2 above.
\end{itemize}
with a reverse burden of proof\textsuperscript{35}, and an extended “catalogue”\textsuperscript{36} of exempted perils which included nautical fault\textsuperscript{37}. This was accepted by the cargo owners.

The convention was then to be enacted by the signatory states – which included all major western maritime nations – as mandatory legislation for international trade\textsuperscript{38}. Accordingly, once enacted, there was no longer a difference in the legislation on cargo damage between the major trading nations, thereby enabling certainty by removing the incentive for negligence clauses and forum shopping.

2.4 Conclusion

The role of uniform laws is to avoid differences in the substantive law of different jurisdictions and thereby provide international certainty by removing the incentive for forum shopping. Accordingly, the strength of a uniform law is in its uniformity, as any difference between jurisdictions invariably will be sought relied upon by the parties, recreating a situation like the one at the time of \textit{Re Missouri}.

Further, it is important to bear in mind the nature of a uniform law as a compromise, not so much between the states that signs it, but between the interested private parties that the uniform law will affect. If one for instance reads the \textit{travaux préparatoires} to the Hague Rules it is the considerations of the cargo interests and shipowners that are being voiced\textsuperscript{39},

\begin{itemize}
\item \textsuperscript{35} I.e. the carrier himself has to prove that he has not been negligent in due diligence, which in practice is a considerably higher threshold than the ordinary burden of proof in matters of negligence where the claimant (the cargo owner) has to prove negligence.
\item \textsuperscript{36} The Hague Rules article IV rule 2
\item \textsuperscript{37} Article IV rule 2(a)
\item \textsuperscript{38} Article X and the Protocol of Signature.
\item \textsuperscript{39} E.g. Sturley (1990) p. 248 \textit{et seq.} containing the discussion on “the catalogue”.
\end{itemize}
not the more typical (geo)political interests of each state. In this sense, it may be said that a uniform law has much in common with private law contracts.

3 THE DOMESTIC ENACTMENT OF UNIFORM LAWS

3.1 Introduction

In order for the purpose of uniformity to succeed it is crucial to acknowledge that the uniformity efforts are not concluded by signing the convention text\(^{40}\). It is equally important that the domestic legislatures are conscious of the overriding purpose of uniformity when enacting the uniform law into domestic law\(^{41}\).

As the domestic enactment forms the starting point of interpretation\(^{42}\) it may have a significant bearing on the later construction upon which the court settles. In fact, discrepancies in the domestic enactment of uniform laws between signatory states are generally viewed as a key hindrance to international uniformity\(^{43}\).

This chapter will explore the nature of the international law obligation Norway is under in enacting uniform laws and how uniform laws are typically enacted in Norway. Much of the discussion in this chapter, and indeed the later chapters on interpretation, builds on the thorough review of transformations and their implications on Norwegian law that was carried out by the *Transformation committee*\(^{44}\) in 1972. The Transformation committee was a law commission appointed by the state to conduct a review of Norway’s approach to the

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\(^{40}\) Lødrup (1966) p. 103

\(^{41}\) *Ibid.*; see also Røsæg (2009) to the same effect.

\(^{42}\) Oftedal Broch (1968) p. 603


\(^{44}\) NOU 1972:16
transformation of international obligations, among them uniform laws, in view of the Norwegian EC (now EU) vote later that year\textsuperscript{45}. As Norway voted no to EC membership, much of the committee’s purpose was rendered obsolete. The report’s discussion of uniform laws remains however the only detailed discussion on uniform laws from a legislative perspective. The uniform law considerations remain unaffected by the EC vote and are, I would submit, as relevant today as they were in 1972.

### 3.2 Domestic enactment – the obligation under international law

A convention becomes binding upon the signatory state when it is ratified\textsuperscript{46}. In this relation binding is meant in the sense: has to be performed. Performance of conventions may vary and entail an array of possible obligations from giving general rights to citizens to more specific performance such as respecting an agreed border or paying set contributions to an international organisation\textsuperscript{47}.

In terms of uniform laws, the performance obligation upon ratification will invariably be the enactment of the uniform law into domestic law. As will be seen below, the reason for this is that an international obligation must be enacted into domestic law in order for it to be directly applicable in Norwegian courts\textsuperscript{48}. In Norway, the process of enacting an international obligation into domestic law is traditionally referred to as \textit{transformation}.

The central question regarding enactment is; is Norway obligated to enact the wording of the convention or its content (in the meaning; the intention of the provisions)?

\textsuperscript{45} NOU 1972:16 p. 7  
\textsuperscript{46} See NOU 1972:16  
\textsuperscript{47} See NOU 1972:16 p. 10  
\textsuperscript{48} Ruud (2006) p. 58
In transforming a uniform law, Norway is under a “good faith” obligation as per the fundamental international law principle of “pacta sunt servanda” (“agreements must be kept”), which is codified in the Vienna Convention article 26. This obligation does not however render an answer as to whether it is the wording or content the state is bound to perform.

Where a convention does not itself provide for how enactment is to be carried out, the good faith obligation must be considered to allow the individual state to enact the convention as it considers appropriate\(^\text{49}\). In other words, as long as the substantive meaning of the convention is carried forth the state has fulfilled its performance obligation.

The Hague Rules represent a uniform law that specifically provide for how the Rules are to be performed, as per the Protocol of Signature:

“The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention.”

There is no apparent difference between this obligation and the general “good faith” obligation under international law. It is however clear, that even if there are discrepancies in the wording of the NMC and the Hague Rules, Norway will \textit{prima facie} not be in breach of any international law obligation by rewording the Rules in the domestic enactment as long as the underlying meaning of the convention provisions remain\(^\text{50}\).

That is not to say that rewriting is advisable to enact a uniform law that differs from the international text. As will be discussed below, domestic enactments that rewrite the international text may, even where the substantive meaning is retained in the domestic enactment, become contrary to the overriding purpose of international uniformity.

\(^{49}\) See NOU 1972:16 p. 13
\(^{50}\) It is clear from the domestic preparatory works to the NMC 1994, that there is no intention to enact provisions contrary to the Hague Rules; cf. Ot. prp. nr. 55 (1993-94) p. 3.
3.3 Transformation – enacting the uniform law in domestic law

As already highlighted, the transformation of the uniform law is essential in order to achieve uniformity. If an international obligation is transformed into domestic law by a provision that carries little resemblance to the original text, the likelihood of an interpretation that diverts from the intention of the original text increases\(^{51}\).

Under Norwegian international law, three alternative methods of transformation are usually identified; (i) active transformation (the translation method), (ii) incorporation (the referral method) and (iii) passive transformation (ascertainment of conformity method).

A detailed discussion on the relative advantages and disadvantages of these methods of incorporation is beyond the scope of this paper\(^{52}\). But there are certain differences that merit mention. Traditionally transformation and incorporation was seen as opposites\(^{53}\) in that transformation entails a rewriting of the convention text, in most cases this means translating the convention to Norwegian\(^{54}\), whereas incorporation requires no rewrite, but simply an act that enacts the convention text as domestic law\(^{55}\). Today however incorporation is generally viewed as a method of transformation\(^{56}\). The last method of transformation, passive transformation, is merely an ascertainment that the domestic legislation fulfils the obligations under a convention\(^{57}\).

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\(^{51}\) See footnote 44.
\(^{52}\) See Ruud (2006) p. 58 et seq. for a more detailed discussion on these methods of transformation.
\(^{53}\) See NOU 1972:16 p. 13-15
\(^{57}\) NOU 1972:16 p. 15; Ruud (2006) p. 62 The classic example being if Norway entered into a convention banning the death penalty. As Norway has no death penalty, the fulfilment of the obligation could easily be ascertained in the existing legislation.
The transformation method of the Hague Rules into Norwegian law was subject to debate prior to the enactment of the Bill of Lading Act 1938. In a letter to the Parliamentary Judiciary Committee in 1937 the Ministry of Justice wrote in favour of an incorporation of the Hague Rules:

“[Incorporation] has the advantage that the courts and other interested parties readily will be able to take foreign case law and legal theory as aids in the interpretation of the convention’s provisions.”\(^{58}\)

The Judiciary Committee rejected incorporation and chose instead an active transformation of the Hague Rules, by translating the Rules into Norwegian and then enact it as the Bill of Lading Act 1938\(^{59}\). The committee’s reasoning for such an approach was *inter alia* that the other signatory states had done it that way. The committee did see fit to point out however that:

“[The rendition of the convention] has of course not had the intention at any point to change the content. On the contrary, it has been imperative for the commission to carry forth the provisions’ content as accurately as possible.”\(^{60}\)

Active transformation is still the predominant transformation method for uniform laws\(^{61}\). The Hague Rules is not however enacted through active transformation.

The Bill of Lading Act 1938 was repealed through the Norwegian Maritime Code 1893 Amendment Act 1973 (which entered into force in 1985\(^{62}\)). The provisions of the Bill of Lading Act 1938 were transferred to the NMC 1893\(^{63}\) as part of a larger revision. The car-

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\(^{58}\) Letter included in Innst. O. II (1938) at p. 3-4 (*author’s translation*)

\(^{59}\) Original title being the Enactment of the International Convention on Bills of Lading of 25 August 1924 Act 1938

\(^{60}\) Innst. O. II (1938) at p. 4 (*author’s translation*)

\(^{61}\) See Ruud (2006) p. 58

\(^{62}\) Cf. Royal Decree 11. January 1985 no. 20

riers’ central liability exemptions for cargo damage in the Hague Rules article IV (“the catalogue”), including the nautical fault exemption, which was enacted by § 4 of the Bill of Lading Act, largely kept its wording but was moved to § 118 of the Norwegian Maritime Code 1893.

From a transformation perspective this change in enactment may in my opinion still be considered an active transformation. Whilst for instance article IV (§ 4 Bill of Lading Act 1938) were separated from the other provisions of the Rules, it remained by its wording and structure (in § 118 NMC 1893) a clear enactment of article IV.

The moving of article IV to § 118 of the NMC 1893 was however a modest change compared to the original intentions of the Norwegian Maritime Law Committee chaired by Sjur Brækhus. Brækhus had in the time leading up to the 1973 revision argued that the “catalogue” of exemptions in article IV, beyond nautical fault and fire, were superfluous and could be significantly simplified (and thereby improved) as a simple negligence rule.

The maritime law committees of the other Nordic countries rejected such a redraft however because they considered it a deviation from the original article IV and contrary to their obligations under the Hague Rules. The Norwegian committee thereafter decided to abandon their redraft in deference to the Nordic collaboration. Instead changes in the wording were carried out to bring the provision into closer alignment with the Hague Rules.

Then in 1994, the Norwegian maritime law committee (then no longer led by Brækhus, but Selvig) succeeded in enacting a redraft of the catalogue in article IV of the Hague Rules in

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64 NOU 1972:11 p. 14
65 Brækhus (1967) chapter VI; see also Ot. prp. nr. 28 (1972-73) p. 10.
66 There is a close collaboration between the Nordic countries in maritime law matters; see 6.5 below.
68 Ot. prp. nr. 28 (1972-73) p. 10.
69 NOU 1972:11 p. 14 (second column)
the new NMC 1994 (where it remains today), with a simple negligence provision included in § 275\textsuperscript{70} and the nautical fault and fire exemptions in § 276 – much like the suggestion that had been proposed and rejected in 1973.

From a transformation perspective this was a transition from an active to a passive transformation. Whilst the new § 276 arguably retains the substantive meaning of article IV (i.e. it will likely yield the same result), as was indeed argued by Brækhus\textsuperscript{71}, it does not retain resemblance to the wording and structure of the convention text. It appears as a domestic provision which the legislature has stated meets the obligations under the Hague Rules\textsuperscript{72}, accordingly it is a passive transformation of article IV.

In the following I will first, in sub-chapter 3.4, look closer at this ousting of the catalogue from the NMC in order to shed light on instances where the original convention text are substantially rewritten upon enactment into domestic law. Then I will address the potential practical detriments such rewriting may cause to uniformity in sub-chapter 3.5.

### 3.4 Example: Ousting “the catalogue” in article IV from the NMC

The Hague Rules article IV rule 2 provides the carrier’s exemption from liability due to nautical fault or fire in letters (a) and (b). It then goes on to list a multitude of other exemptions including peril of the sea, act of god, act of war, strike etc. – in total seventeen further exemptions from liability including a residual provision in letter (q) “any other cause arising without the actual fault or privity of the carrier” – these exemptions, in letters (c) to (q) is usually referred to as “the catalogue”.

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\textsuperscript{70} Which included the exemption for deviation, cf. § 275(2).
\textsuperscript{71} Brækhus (1967)
\textsuperscript{72} NOU 1993:36 p. 35 as cited in Ot. prp. nr. 55 (1993-1994) p. 19
Brækhus was not the first to consider the catalogue superfluous. Already during the negotiations of the Hague Rules the French delegate Leopold Dor brought this to the attention of the Conference. Dor highlighted that, at least from a French perspective, the catalogue could be condensed into one single term – *force majeur*. He further suggested that from an English perspective it could be condensed as “*causes beyond the control of the shipowner*”. Dor’s British counterpart, Sir Norman Hill (representing the British Shipowners’ Association) abstained from a discussion on the substantive implications of Dor’s suggestion, but stated that he would “*despair of ever getting [the Rules] accepted with the shipowners unless [he] could point to their old familiar exemptions*”. As evidenced by the inclusion of the catalogue in the eventual Rules, the Conference conceded to Sir Norman’s worries about obtaining acceptance.

The position taken by Brækhus and Dor is in my opinion substantively correct in that the catalogue contributes nothing that is not encompassed by a simple negligence rule with a reverse burden of proof. As both further argued the position would be the same in English law. Sir Norman Hill for instance accepted the possibility that the catalogue contained nothing that was not already encompassed in letter (q), he even went as far as inferring that the catalogue may be “pig-headed” (or rather the shipowners insisting on it).

The basis upon which Brækhus argued for the ability to rewrite the catalogue was the Hague Rules Protocol of Signature. Only a difference in substance would be in breach of

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74 *Ibid.* at p.250
76 *Ibid.* at p. 251
77 Brækhus (1967) Chapter VI, citing the 12th (1925) Edition of Scrutton; Dor *ibid.* at p. 250
the Rules he argued\textsuperscript{80}. As already told the Scandinavian collaboration did not agree with Brækhus in 1973 and rejected such a rewrite as contrary to the Rules\textsuperscript{81}.

In terms of the Protocol of Signature, it allows “including [the Rules] in... national legislation in a form appropriate to that legislation”. Natural in addressing what is “appropriate” would, in my opinion, have been if there had been voiced difficulty in applying the Rules by the courts or other interested parties. No such difficulty existed. In fact, Tiberg has argued to the contrary in that the catalogue had proved a practical tool for, for instance, claims adjusters\textsuperscript{82}.

Whilst I, as set out in 3.2, agree with Brækhus in the stricter sense that the performance obligation goes towards the enactment of the substance rather than wording, redrafting a central part of the uniform law compromise is certainly pushing boundaries. It further stands to reason that when a proposal, to the same effect as Brækhus’, was discussed and rejected at the negotiations of the Hague Rules\textsuperscript{83}, it must be considered a substantive breach of the convention for a signatory state to enact the rejected solution regardless.

Further, and more damaging, such an approach ignores the overriding purpose of uniformity. As highlighted by the current chair of the Norwegian Maritime Law Committee, Erik Røsæg:\textsuperscript{84}

“There is a reason why one agrees on a wording, and not on a set of abstract ideas, to ensure uniformity.”\textsuperscript{84}

\textsuperscript{80} Ibid.
\textsuperscript{82} Tiberg (1995) p. 339
\textsuperscript{83} I.L.A. Second Day’s Proceeding p. 143 (included in Sturley (1990) p. 249)
\textsuperscript{84} Røsæg (2009) p. 174-175.
These uniformity aspects and implications of the redrafted provision were left unaddressed by the Norwegian Maritime Law Committee in their proposal for the ousting of the catalogue from the NMC 1994.

3.5 The practical detriments caused by rewriting

As already highlighted above, discrepancies between the international text and the domestic enactment are unfortunate because they work against the purpose of uniform laws by increasing the likelihood of difference in interpretation. For that reason alone the legislature should be reluctant to significantly rewrite provisions when enacting uniform laws.

Rewriting may also have a more practical implication in terms of how courts, practitioners and other interested parties relate to the domestic enactment. As argued by Lødrup there is a correlation between how likely a judge is to utilise international sources of law in interpretation, and how much of the conventions international character that is retained in the domestic enactment.

This is unfortunate because the use of foreign sources in and by itself cements a uniform approach to the uniform law. Further, such sources could prove useful aids to Norwegian interpreters whilst foreign practitioners, in turn, may more readily rely on Norwegian practices if the domestic enactment closely resembles that in their own jurisdiction.

Taking for instance the most recent Norwegian Supreme Court case on the nautical fault provision, § 276 NMC, in the Sunna as an example:


86 Lødrup (1966) p. 80. See also; Inns. O. II (1938) at p. 3-4

87 Stanford (1987) p. 269
The Sunna concerned a ship that ran aground off the Orkney Islands when the duty officer fell asleep on a voyage from Iceland to England. The master had established a practice, contrary to safety regulations, of not keeping an additional lookout when sailing in darkness.

Whilst the Supreme Court considered the duty officer falling asleep as a nautical fault, the carrier was not able to rely on the exemption due to the masters’ malpractice constituting a failure in due diligence in making the ship seaworthy at the commencement of the voyage.

The Supreme Court made no reference to foreign case law although for instance the issue of whether the masters’ intended malpractice of not properly manning the bridge, i.e. his state of mind prior to commencement, could have found some guidance in the decision of the House of Lords in the Hill Harmony88. Further, whilst the Supreme Court did not see fit to consider whether gross negligence, in this case falling asleep, fell within the scope of nautical fault. They could have found guidance on that issue in the then very recent decision of the New Zealand Supreme Court in the Tasman Pioneer. The other way around the Norwegian decision may aid other courts on the proximate cause of the damage in terms of nautical fault as well as the possibility of the master’s state of mind constituting unseaworthiness. The fear however is that a foreign court, understandably, may be hesitant in relying on Norwegian decisions that considers a provision that is worded and structured differently to the original convention text.

In summary, again returning to the catalogue, my point is this: there may or may not be a substantive difference between article IV of the Rules and the NMC §§ 275 and 276. I would think that there is not. What is, however, is a considerable difference in wording. And that difference is more likely – due to entirely practical reasons – to cause discrepancies in the interpretation of the uniform law by stunting the scope of material that the given interpreter may deem available to him.

88 Solvang (2011) p. 6250
3.6 Conclusion

For an international obligation to become Norwegian law it has to be enacted into domestic law. The innate purpose of uniform laws in enabling international uniformity speaks strongly in favour of an *active transformation* of the international text into domestic law – in the sense that the uniform law is translated into Norwegian with changes to the wording only where there is a concrete need for clarity – or even better, through *incorporation*\(^89\).

The discussion on the ousting of the catalogue has shown that whilst the international law obligation in terms of enactment relates to the substantive content of the uniform law, rather than the wording, this does not entail free reign. Rewriting should be considered with reluctance due to the adverse effects it may have on uniformity. As Røsæg writes, rewrites may look better on the local eye, but they will likely cause more confusion than clarification\(^90\).

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\(^{89}\) NOU 1972:16 p. 97.
\(^{90}\) Røsæg (2009) p. 185
PART II – INTERPRETATION\textsuperscript{91}

4 THE WEIGHT OF DOMESTIC PROVISIONS

4.1 Introduction

In his 1966 treatment of uniform law interpretation Lødrup states that in principle the means by which the uniform law has been enacted into domestic law – its transformation – should have no bearing on the subsequent interpretation of a uniform law provision in that the result should be the same regardless of enactment method\textsuperscript{92}. He interjects however that so may not be the case in practice and that the result may very well be affected by the chosen means of transformation\textsuperscript{93}. The reason for this is that, regardless of international considerations, the domestic enactment will form the starting point of interpretation\textsuperscript{94}.

As will be seen below, the Norwegian common law \textit{presumption principle}, may however work in favour of uniform interpretation at expense of the domestic enactment, very much adhering to the principle set forth, in that the domestic enactment should have no bearing on how a uniform law provision is construed\textsuperscript{95}.

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\textsuperscript{91} It is again highlighted that the interpretation of uniform laws discussed is private law matters. For uniform laws within criminal law, the principle of legality would dictate that the domestic enactment is binding on the state, regardless of the underlying convention; Oftedal Broch (1968) p. 603-604.
\textsuperscript{92} Lødrup (1966) p. 79
\textsuperscript{93} Lødrup (1966) p. 80
\textsuperscript{94} Oftedal Broch (1968) p. 603
\textsuperscript{95} See also NOU 1972:16 p. 41, where the Transformation committee states that there are “strong reasons” for interpreting the domestic enactment in light of the original convention, see also p. 91-92.
4.2 Dualism and sovereignty

A good place to start when considering the relationship between domestic and international law in interpreting a provision deriving from a uniform law, is to ask the question: why is there even a need for a domestic enactment of an international uniform law?

The answer is dualism\textsuperscript{96} – the notion that international law is predicated on the acceptance of sovereign states, rather than the other way around (that states derive their authority from international law)\textsuperscript{97}. The consequence of dualism is that for an international convention to be binding in Norway (i.e. for a convention to be relied upon by the Norwegian courts), it has to be enacted into domestic law by an act of parliament\textsuperscript{98}.

Whilst there has long been a clear acceptance of dualism in Norwegian legal theory\textsuperscript{99}, it was first expressly stated by the Norwegian Supreme Court in 2000, in its plenary judgement in \textit{Finanger I}\textsuperscript{100} – a case regarding the relationship between Norwegian domestic law and EU law (that Norway under the EEA agreement have agreed to enact).

\textit{Finanger I} concerned a personal injury claim against an insurance company from a passenger of a car whose driver was driving under intoxication and drove off the road. The passenger sustained severe injury leaving her permanently disabled. The passenger was herself intoxicated at the time of the accident and knew that the driver was too.

\textsuperscript{96}Although, Lødrup (1966) p. 74 expressly denies the relevance of dualism in terms of enactment, instead he attributes the need for enactment to the legality principle (“\textit{legalitetsprinsippet}”). This must be seen in light of the rather substantial Norwegian dualism/monism debate of the era. The leading “modern” Norwegian international law texts however attribute the need for enactment to dualism, see Ruud (2006) p. 58 and Fleisher (2005) p. 358-359.

\textsuperscript{97}The opposite of dualism is monism; which dictates that domestic sovereignty is based on international law, and so international law will always be superior and (directly) binding on domestic law.

\textsuperscript{98}As Norway is not a member of the EU, there is no issue in terms of the sovereignty of the EU within the four freedoms. In accordance with the EEA-agreement, even EU regulations need enactment of the Norwegian parliament to be binding (unlike in EU member states where they have direct effect).

\textsuperscript{99}See Helgesen (1982) p. 11 \textit{et seq.} historical account of the debate on dualism or monism in Norway.

\textsuperscript{100}Rt. 2000 p. 1811.
A central issue in the case was whether Norwegian domestic law – that at the time enabled an insurance company to refuse damages to an injured person that knew the driver was driving whilst intoxicated – was at odds with EU law. And if so whether the Norwegian domestic law then had to be interpreted in a manner consistent with EU law.

The Supreme Court held (plenary decision) that there was a contradiction between the Norwegian domestic law on the one hand and EU law on the other. In such cases it was beyond the powers of the courts to force alignment through interpretation, rather it was for the Norwegian parliament to align Norwegian domestic law with EU law through legislation (10-5 dissent)\(^\text{101}\) and Miss Finanger’s claim against the insurance company was dismissed (dissent 8-7)\(^\text{102}\).

Looking at it from a strictly dualistic point of view it appears that Norwegian courts will only be bound by the domestic law enacted by the Norwegian parliament along with its preparatory works and subsequent case law. Such a view, whilst a starting point, would however be overly simplistic in relation to international uniform laws.

As will be argued below, the strength of dualism in a given case may range from a *strict dualistic approach* – which entails that the courts are bound to the domestic enactment passed by parliament with no avail in the international obligation it enacts – to a *strict presumptive approach* – which entails that once an international obligation has been enacted into domestic law, the courts are bound to force alignment through interpretation with the international obligation regardless of the wording of the domestic enactment or other domestic legislation or precedents\(^\text{103}\).

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\(^{101}\) In these "Brexit"-days it is noteworthy that *Fiananger I* finds its parallel in the decision of the House of Lords in *Factortame I* (*R v Secretary of State for Transportation, ex parte Factortame* [1991] 1 AC 603), but with the opposite conclusion as to the impact of EU law. This highlights the central difference in parliamentary sovereignty within EEA and EU law respectively.

\(^{102}\) Miss Finanger did however later succeed in a claim against the state for its failure to bring domestic law in line with EU law; see *Finanger II* Rt. 2005 p. 1365 (plenary decision; dissent 9-4).

\(^{103}\) The *strict presumptive approach* must not be mistaken for *monism*. The *strict presumptive approach* is predicated on dualism in that it requires enactment of the international obligation, which would be unnecessary under a monistic approach.
The means by which the relevant standard of dualism is determined is the force of the presumption principle in a given case. The force of the presumption principle is in turn determined by the characteristics of the relevant international obligation enacted and the domestic law area to which it relates as discussed in 4.3 and 4.4 below.

4.3 Presumption and loyalty

As expressed above the presumption principle (‘presumsjonsprinsippet’) – which entails a presumption that an enactment of an international convention into domestic law is done in good faith and with loyalty towards the obligations conferred on the signatory states by the convention – works as an important supplement under a dualistic approach to international law. It follows from the principle that a domestic enactment of an international obligation is presumed to have been passed by the legislature in accordance with the international obligation, and that the courts therefore must construe provisions of a domestic law in a manner consistent with the international obligation it enacts. Accordingly the principle works as a means of mitigating dualism in holding the legislature to its international obligations by enabling alignment through interpretation.

In Finanger I, justice Flock (with whom the majority agreed) outlined the central determining factors as to the force of the presumption principle:

“The presumption principle in Norwegian law has been developed in case law. The force\textsuperscript{104} of this principle will depend on the nature of the relevant obligation under international law and to which area of law the domestic legal rule is associated. [...] Norwegian domestic law will provide little resistance if there is talk of conflict with an obligation under international law

\textsuperscript{104} The original Norwegian wording is “gjennomslagskraften” which directly translates to “the breakthrough force”. In context, and particularly with reference to the last sentence of this paragraph, this refers to the force with which the presumption principle may break through the dualistic starting point.
The essence of this statement, in my opinion, is that the force of the presumption principle is variable and dependent upon the nature of the international obligation and the area of law of a given case. Read antithetically it entails that the strength of dualism is similarly variable. This is particularly clear from the last sentence which entails that dualism will offer the state little protection against an international law obligation, whereas private parties will enjoy greater protection.

When discussing the interpretation of uniform laws by Norwegian courts it is therefore essential to look closer at their nature and characteristics, in order to determine the force with which the principle applies.

4.4 The force of the presumption principle when interpreting uniform laws

It is evident from the discussion of the legislative history of the Hague Rules in chapter 2 above, that the purpose of the Rules was to reach an international compromise on risk allocation for cargo damage. As the term implies, this is the very nature of all uniform laws.

Given the emphasis of “the nature of the relevant obligation under international law” in justice Flock’s lead judgement in Finanger I, the innate purpose of international uniformity alone, clearly indicates that the presumption principle will apply to uniform laws with considerable force. This is also finds support in the 1972 report of the Transformation committee:

“[It may] be emphasised that typical uniform law conventions tasked with implementing uniformity between convention states within the area [of law] the convention covers. If this is to be achieved, states must be most loyal to the convention. Even if there are arguments in favour of

105 Rt. 2000 p. 1811 at 1829 (author’s translation, justice Flock’s italics).
transforming the text of the treaty and as such break the Norwegian rules from the convention, 
one should nevertheless when interpreting the enactment provisions aim to achieve harmonization 
between the convention states.

[Accordingly] there are strong reasons in favour of Norwegian provisions that implements 
transformed convention obligations, being interpreted in light of the convention.”^{106}

It may be interjected however whether uniformity is not the purpose of all international 
law; to create similar legal obligations in all signatory states? Yes and no. It is certainly not 
true of all international obligations, for instance trade, tax or border treaties only apply be-
tween two (or a limited number of) states. Norway’s trade treaty with state A may be very 
different to the trade treaty with state B. On the other hand, human rights conventions – 
such as the European Convention on Human Rights – are intended to confer similar obliga-
tions on all signatory states (and similar rights to their citizens). There is however a sub-
stantial difference between conferring similar obligations and creating uniform obligations. 
Whereas human rights conventions confer broad and overarching obligations on signatory 
states, uniform laws confer very specific obligations based on a detailed international com-
promise on a strongly confined area of law.

What sets uniform laws further apart, is that the main purpose is not necessarily to confer 
domestic obligations, but rather to harmonise legislation in the international sphere. This is 
well illustrated by the Hague Rules article X that states that the Rules only applies to car-
rriage of goods in international trade (“carriage of goods between ports in two different 
States”). In terms of the nautical fault exemption, this is additionally emphasised by the 
NMC § 276(3) which expressly states that the nautical fault exemption does not apply to 
contracts for carriage in domestic trade.

The international, rather than domestic, scope of application of uniform laws, as evidenced 
by the Hague Rules, further speaks to the proposition that the presumption principle is giv-
en a forceful application when interpreting domestic enactments of uniform laws. This
finds support in justice Flock’s statement in *Finanger I* above that “the force of [the pre-
sumption] principle will depend on... which area of law the domestic legal rule is associat-
ed”. The domestic enactment of the Hague Rules are closely associated with international
legislation in an area of law, transportation law, which itself is of a considerable interna-
tional nature.

It should here be mentioned that the nautical fault exemption for instance has been express-
ly exempted from domestic application in Norway, cf. § 276(3). It is submitted that it
would be entirely meaningless to give dualism any weight, beyond a simple assertion of
enactment, when interpreting a provision that has no domestic application. Uniform law
provisions such as the nautical fault exemption, which are exempted from domestic appli-
cation, provides the clearest possible example of provisions that must be interpreted with
the full force of the presumptive principle; forcing alignment through interpretation by any
means necessary.

A third characteristic, but not absolute\textsuperscript{107}, is that uniform laws govern private law areas; for
instance contract law\textsuperscript{108}, transportation law\textsuperscript{109} and arbitration law\textsuperscript{110}. The statement of jus-
tice Flock in *Finanger I* that “the resistance [of Norwegian domestic law] will be greater
where such an obligation [under international law] intervene in private legal matters”
would accordingly pull in the direction of a less forceful application of the presumption
principle in the interpretation of uniform laws.

\footnotesize
\textsuperscript{107} The central customs convention; the International Convention on the Harmonized Commodity Description
and Coding System (the HS Convention), which includes the so-called HS-nomenclature (which in turn is the
basis for a uniform nomenclature/tariff in 150 countries and the EU, representing 98% of world trade) is an
example of a uniform law within public law.
\textsuperscript{108} CISG
\textsuperscript{109} The Hague Rules, CMR, the Warsaw Convention
\textsuperscript{110} The New York Convention
The reluctance of intervening in private legal matters was justice Flock’s reason for ultimately rejecting a strong application of the presumption principle in *Finanger I*:

“It is in this regard also essential that [the domestic provision] regulate the legal relations between private parties, where the presumption principle as previously mentioned do not have the same force as in for example cases where obligations under international law gives the citizen protection against intervention by the state. …

I also emphasise that such an application of the presumption principle that A asserts, would create general uncertainty about what applies in legal relations between private legal entities and the public, and in legal relations between two private parties. The [EU] directives constitute both in number and scope a very large and not very clear legal material. They often contain generally formulated requirements about what content the national rules must have. In the future, there could be cases where it will be clear that the legislature has considered the relationship with the EEA law in a different manner than the courts later decide is correct. It would be problematic for private legal entities if they cannot rely on legal provisions that the legislature has deemed in accordance with Norway's international obligations. This also suggests that clear legal provisions should not be set aside in cases like the present.”

The essence of this approach is to ensure predictability and certainty in the legal relationship between two private parties. It is worth emphasising that the matter in *Finanger I* was a dispute between a private individual and an insurance company, as to whether a domestic legal provision should be set aside in deference to EU law.

There is in my opinion two reasons why these concerns are largely inapplicable to private parties in relation to uniform laws. The first is that uniform laws provide specific legislation within a limited area of law. For instance the Hague Rules provide a set of rules for the carrier’s liability for cargo damage under bills of lading. Whilst the Rules certainly has

111 Rt. 2000 p. 1811 at 1832 (*author’s translation*).
their intricacies they are worlds apart from the vast and complex body of directives, regulations and case law that so often signifies EU law\textsuperscript{112}.

It is granted however that a strong presence of the presumption principle when interpreting uniform laws will entail giving considerable weight to decisions from domestic courts in other signatory states, see chapter 6 below, and that this may give rise to a fragmented (and thereby uncertain) body of relevant law. The international body of law will not however become any less fragmented or more certain by the contracting states approaching interpretation in an isolated and strictly dualistic manner.

The second, and more important, reason again stems from the international nature of uniform laws. The parties, although private, will primarily be subjected to uniform laws only if they venture into the international sphere, or intend to do so. When contracting across borders it is reasonable to expect that domestic provisions do not apply with the same force as in entirely domestic legal matters. Further, in the international sphere it is the uniform law that provides certainty for private parties. In terms of bills of lading you will for instance be hard pressed to find a bill of lading issued under a charter party that does not include a so-called \textit{paramount}-clause (a clause that ensures that the issued bill of lading is subjected to the Hague Rules), precisely to provide the parties certainty between themselves regardless of where the cargo damage should occur or other aspects relevant to the conflict of laws. In order to provide certainty to private parties that venture into the international sphere then, the presumption principle should therefore be given considerable weight.

Lastly it is added that the presumption principle could not, even in relation to uniform laws, form a basis for forcing alignment through interpretation where a domestic provision has been passed by the legislature with the express knowledge and intention to enact a provision contrary to an international obligation\textsuperscript{113}. For that dualism and the sovereignty of par-

\textsuperscript{112} As per justice Flock in \textit{Finanger I} above.
\textsuperscript{113} See Ruud (2006) p. 64-65.
liament is too strong under Norwegian law\textsuperscript{114}. There is however no known occurrence in Norwegian law of a provision that explicitly rejects a ratified international obligation\textsuperscript{115}.

4.5 Conclusion

Difference in text and structure between a uniform law and its domestic enactment gives rise to the central question of which text takes precedent when domestic courts are to interpret a given provision.

Although the relationship between international law and domestic law in Norway is based on dualism – meaning that as a starting point it is the domestic provision that takes precedence – this is substantially modified by the \emph{presumption principle} – which dictates that a domestic enactment of international law is presumed to be in conformity with said obligation. In terms of uniform laws the presumption principle may have a particularly forceful application enabling Norwegian courts to force alignment through interpretation.

As the presumption principle is a significant force in the interpretation of uniform laws it is of further interest to discuss what legal sources, beyond the wording of the uniform law itself, may be used by the courts when construing provisions of uniform laws. The central international sources of law available to the courts – the convention text and its legislative history as well as case law from other contracting jurisdictions – are discussed further below.

\textsuperscript{114} See also \textit{Finanger I} above.
\textsuperscript{115} \textit{Ibid.} at p. 64.
5 THE CONVENTION TEXT AND LEGISLATIVE HISTORY

5.1 Introduction

The significant strength of the *presumption principle* in interpreting uniform laws, and thereby the modest if any weight attributed to the wording of the domestic enactment provision, renders the question as to which legal sources the courts are to reach for beyond the domestic enactment. The natural first port of call is the text of the convention itself and its legislative history.

5.2 The Vienna Convention and *customary international law*

Internationally, the applicability of the convention text and legislative history appears to have risen from the purpose of uniformity alone\(^{116}\), the rational being that the text itself and the legislative history represent the one common denominator, shared by all contracting jurisdictions and that reliance on common denominators is most likely to yield a uniform result.

From a Norwegian perspective Lødrup suggests that the relevance of the convention text and its *travaux préparatoires* may be found by considering both as part of the preparatory work to the domestic enactment\(^ {117}\). I find this approach unsatisfactory as it indirectly subjects the uniform law to the domestic enactment. Another approach may be to see the use of the convention text as a necessary consequence of the *presumption principle*.

A stronger basis may however be to anchor the applicability of the uniform law text in article 31 of the Vienna Convention – stating interpretations of a treaty shall comprise the text of the convention itself – and article 32 – which states that recourse may be had to the preparatory work of the convention. Norway has not ratified the Vienna Convention but the

\(^{116}\) See the House of Lords in *Stag Line*.

\(^{117}\) Lødrup (1966) p. 98 (written prior to the Vienna Convention).
Norwegian Supreme Court has held articles 31 and 32 as customary international law principles applicable to Norway. There is not yet any decision from the Norwegian Supreme Court on the applicability of article 31 and 32 to uniform laws however.

Some academics take the applicability of the Vienna Convention to uniform laws as granted, as did the Transformation committee.

Some caution should be exercised however in the reliance on the Vienna Convention in terms of the interpretation of uniform laws. The Vienna Convention was concluded with the intention to regulate relations between states, whilst uniform laws primarily regulate relations between private parties. Gardiner are amongst the few to expressly address this issue, and concludes that the Vienna Convention is applicable to all treaties due to the fact that the Vienna Convention merely codifies existing customary international law principles which are already generally applicable. It is worth noting however that the House of Lords in the Rafaela case based their reliance on the convention text and legislative history on the purpose of uniformity alone, despite the appellant’s submission of the Vienna Convention as basis for such interpretation (a submission that was passed in silence by the House of Lords).

It should also be added that the Vienna Convention may only apply to uniform laws concluded after the Vienna Convention, a fact which would exclude a considerable number

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118 Rt. 2004 p. 957 (case on the tax agreement between Norway and the Ivory Coast, the cases that considers the Vienna Convention are primarily cases on tax agreements and the law relating to refugees).
120 NOU 1972:16 p. 43
121 See also Stanford (1987) p. 268-269.
122 Mann (1983) p. 378
124 [2005] 2 AC 423
125 Citing their 1932 decision in Stag Line.
126 Ibid. at p. 425-426
127 Gardiner (1995) p. 621
of uniform laws within transportation law. Customary international law however renders the principles expressed in article 31 to 33 applicable regardless\(^\text{128}\).

Given the clear academic bias towards the applicability of the Vienna Convention, and from a Norwegian perspective, the emphasis put on the Convention by the Transformation committee, my conclusion is that the principles expressed in the Vienna Convention articles 31 to 33, will provide the basis for utilising the convention text and its legislative history when interpreting uniform laws in Norway.

**5.3 The use and weight of the convention text**

As the original expression of the intention of the framers, the convention text is the primary source of law when construing a provision under the remits of a uniform law\(^\text{129}\).

The question then becomes what is the original text? Conventions usually state its authentic language. For instance, the authentic language of Hague Rules is French, meaning that if there is a difference between a translation and the French text, the French text takes precedence\(^\text{130}\).

An important issue in terms of language is that the choice of authentic language as, for instance, French does not entail that the provisions are to be interpreted in accordance with French law and legal tradition\(^\text{131}\). In terms of the Hague rules this is important. The Rules may be seen as a hybrid civil law/common law text, but mostly common law\(^\text{132}\). As was seen in section 3.4 above, article IV of the Rules for instance has a clear bias towards the common law tradition. It would accordingly be erroneous to construe them based on the

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\(^{128}\) See the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251.


\(^{130}\) Lødrup (1966) p. 73.

\(^{131}\) Lødrup (1966) p. 90-91

\(^{132}\) Tetley (2004) p. 14
French law and legal tradition as background law; instead the language must be given their normal everyday meaning\textsuperscript{133}.

It is not necessarily so that the original text will render clear answers to issues on interpretation, indeed when a case arises before the court it is most likely because the text is unclear or silent as to the issue in question. To shed further light on the intention of the framers recourse may be had to the legislative history of the rules and the \textit{travaux préparatoires}.

\subsection*{5.4 The legislative history and \textit{travaux préparatoires}}

Where the convention text renders no clear answer the next source to turn to would be the legislative history of the convention.

Whilst the reliance on the convention text is largely uncontroversial the use of the legislative history and \textit{travaux préparatoires} has been more contentious from a Scandinavian point of view. Lødrup states that the majority Scandinavian view is that legislative history may not be utilised\textsuperscript{134}. The reason being, as argued by Grönfors\textsuperscript{135}, that not all convention states, primarily England, utilise legislative history as a means of interpretation. Accordingly, using a different method of interpretation than that used in all other signatory states would be detrimental to uniformity.

Lødrup takes the opposite view in that the use of the legislative history will shed an objective light on the intentions of the convention’s framers; reducing the subjective attitudes of the interpreter and thereby contribute to uniform interpretation\textsuperscript{136}. In addition, he argues,

\begin{itemize}
\item \textsuperscript{133} Lødrup (1966) p. 91
\item \textsuperscript{134} Lødrup (1966) p. 100
\item \textsuperscript{135} Grönfors (1957) p. 20
\item \textsuperscript{136} Lødrup (1966) p. 100-101
\end{itemize}
the approach of the English courts does not outweigh the prevalence in western jurisdictions of utilising the legislative history of the convention.\(^{137}\)

Much of this discussion stems in my opinion from a misunderstanding of the position on legislative history under English law. Whilst English courts have refused to look to domestic preparatory works (such as the Hansard\(^ {138}\)), they have never abstained from utilising legislative history when interpreting uniform laws. This is for instance evidenced by the opening remarks of Viscount Simonds in *the Muncaster Castle*\(^ {139}\) in 1961:

“[The] solution depends on the meaning of the words occurring in [the Hague Rules] article III, rule 1, and repeated in article IV, rule 1, "due diligence to make the ship seaworthy." To ascertain their meaning it is, in my opinion, necessary to pay particular regard to their history, origin and context…”\(^ {140}\)

In any case, in the landmark decision of the House of Lords in *Pepper v. Hart*\(^ {141}\) in 1992, it was held that the courts may in certain instances utilise the legislative history of a domestic statute. Effectively the English absolute “ban” on preparatory works was lifted. Accordingly there is no resistance left in the arguments against Lødrups position on the use of legislative history.

A possible remnant of the traditional English scepticism towards the use of legislative history may however be found in the Court of Appeal decision in *the Rafaela S*\(^ {142}\). The case concerned the question of whether a straight bill of lading fell within the scope of the Hague Rules. Lord Justice Rix, in his judgement stated that when approaching the *travaux*... 

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\(^{137}\) *Ibid.*

\(^{138}\) The verbatim reports of proceedings of both the House of Commons and the House of Lords.

\(^{139}\) [1961] AC 807 (see also section 6.4 below). In CoA judgement in *the Rafaela S* Rix LJ states the origins of this approach as the House of Lords’ 1932 decision in *Stag Line*; see [2004] QB 702 at 724.

\(^{140}\) *Ibid.* at p. 836

\(^{141}\) [1993] AC 593

\(^{142}\) [2004] QB 702
préparatoires “only a bull’s eye counts”\textsuperscript{143}. In other words, statements in the preparatory works have to be unequivocally clear and address the issue at hand directly in order to lend decisive weight\textsuperscript{144}. Such an approach seems sensible and is aligned with the position taken by Lødrup who, from a Norwegian perspective, states that some restraint should be shown when utilising the legislative history\textsuperscript{145} given their varied nature and thereby value\textsuperscript{146}.

5.5 Conclusion

Customary international law, as codified by the Vienna Convention articles 31 and 32, provides the courts the necessary basis to utilise the convention text and the travaux préparatoires. Whilst there has previously been uncertainty as to whether one can utilise travaux préparatoires in the interpretation of uniform laws, this is no longer the case. Some restraint should be exercised in the use of travaux préparatoires, and “only a bull’s eye counts” as was held in the Rafaela S (CoA).

The use of the convention text and travaux préparatoires is further important because they represent the only sources common in all signatory jurisdictions. Accordingly, they are most likely to yield a uniform interpretation. The interpretation of uniform laws should not stop at the convention text and legislative history, it is further important to look to case law from other signatory jurisdiction.

\textsuperscript{143} Ibid. at 724-725
\textsuperscript{144} I build this on how Rix LJ in the subsequent paragraphs considers and concludes on the travaux préparatoires.
\textsuperscript{145} Lødrup (1966) p. 103.
\textsuperscript{146} Lødrup (1966) p. 100. See also NOU 1972:16 p. 40-42 to the same effect.
6 CASE LAW FROM OTHER SIGNATORY STATES

6.1 Introduction

Whilst the use of convention text and preparatory works may provide important insights into the intention of a uniform law, it is not always so. In those instances, and indeed even where the preparatory works does provide insight, it is natural to look to how the courts of the other signatory states (hereafter “foreign case law”) have construed disputed provision. Whereas the use of convention text and travaux préparatoires may be accepted as customary international law147, the use and applicability of foreign case law is however – again from a Norwegian perspective – more unclear and unaddressed by the Norwegian Supreme Court. This is unfortunate because, as Martin Stanford has emphasised, the consideration by judges of the approach taken by their fellow-judges in other countries to the provisions of uniform laws, is probably the best guarantee for uniformity148.

Because the purpose of uniform laws is the enactment of uniform legislation in different countries it is often the case that an interpretive question facing a domestic court has previously faced a court in another contracting states. The question therefore is; to what extent may a Norwegian court apply such foreign case law when interpreting a domestic provision that corresponds to the provision considered by the foreign court?

6.2 The use of foreign case law

It would be uncontroversial to say that foreign case law may provide a useful and persuasive supplement for Norwegian courts when interpreting a domestic provision that has a similar provision or other relevant law in another country149. There is however no mention-

147 See 5.3 above.
149 See also Skoghøy (2007) p. 567 et seq.
able tradition in Norway for relying on foreign case law outside of EU/EEA law and certain areas of maritime law, like the law relating to charter parties.

Given the purpose of uniform laws and the strength of the presumption principle when interpreting uniform laws (see chapter 4 above), it may however be argued that foreign case law is of more than comparative interest and rather a source of law of considerable weight in the interpretation of uniform laws.

Eckhoff takes a rather moderate position on the matter:

“A purpose of uniform laws is to create uniform rules within the relevant field in the different countries. Intending to realise the legislative purpose is here as elsewhere an important interpretive factor. Realising the above purpose implies that emphasis is not only out on the preparatory works but also on how the law has been interpreted by courts in the countries where [the uniform law] has been enacted. That a provision is understood in a specific way in most other countries is an argument for interpreting it likewise here. But it is not an unconditionally decisive argument, because there may be applicable factors to the opposite, for instance if the interpretation is unreasonable or if it is in poor harmony with other Norwegian legal rules.”

I describe this position as moderate, because it is rather vague. Foreign case law is considered “an argument”. The relative weight of such an argument is not described. I would also be reluctant to read the last sentence “it is not an unconditionally decisive argument” anti-thetically, as meaning that foreign case law is decisive unless there are factors to the opposite. The reason being that whether “the interpretation is unreasonable” is a highly subjective standard that leaves a domestic court considerable room for rejecting any foreign case

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150 Within EU/EEA law however, there is a considerable tradition for such use of foreign case law as detailed in Fredriksen (2011).
151 See for instance the arbitration award in Arica ND 1983 p. 309; see also Solvang (2013); although Solvang’s article goes more towards the absence of Nordic case law in charterparty matters and the role of (English) common law in that vacuum.
law it does not like. I do however have reservations against the remarks carried in the last sentence of the above quote (see 6.3 below).

It is testament to the lack of reliance on foreign case law by the Norwegian Supreme Court that neither Lødrup, Oftedal Broch, Eckhoff nor Skoghøy cites a single case where emphasis was put on foreign case law in the interpretation of a uniform law. A rare example of the Norwegian Supreme Court relying on foreign case law in interpreting a uniform law provision may be found in the Sunny Lady, which was a case regarding the nautical fault exemption. The cargo side argued *inter alia* that the nautical fault exemption was of no avail to the shipowner due to initial unseaworthiness. The Norwegian Supreme Court rejected the argument of initial unseaworthiness. When setting out the general standard of seaworthiness in its assessment of the cargo sides argument, the court referred to the judgement of the US Supreme Court in *Racer*¹⁵³ that the “standard is not perfection, but reasonable fitness”¹⁵⁴. Whilst a clear example of the use of foreign case law in interpreting domestic provisions enacting uniform laws, the reference is brief and never expressed as deference to international uniformity as an interpretive approach.

An expressed and more conscious approach to the application of foreign case law in interpreting a uniform law provision was taken in the recent decision of the Norwegian Court of Appeal (Borgarting) in LB-2014-15414 (*Ministry of Finance against Hordafór AS* – hereafter *Hordafór*). The case concerned a customs classification of animal fodder under the Norwegian customs tariff. The Norwegian customs tariff is in turn an active transformation (transcription) of the uniform HS-nomenclature under the International Convention on the Harmonized Commodity Description and Coding System 1983 (*HS Convention*)¹⁵⁵. The

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¹⁵⁴ This quote is somewhat unfortunate given that *Racer* concerned the common law principle of the shipowner’s strict liability for personal injury caused by unseaworthiness. A more suitable US Supreme Court precedent would in my opinion have been the *Silvia* 171 US 462, which (unlike *Racer*) was a case regarding the nautical fault exemption under the Harter Act 1893. The Court set out the standard of seaworthiness in relation to the nautical fault exemption as “the test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.” (at 464).
¹⁵⁵ See also footnote 44.
court remarked as follows as to the role of foreign case law in interpreting the HS-nomenclature as a uniform law:

“The HS Convention and the HS nomenclature are used for the majority of all world trade and administered by the World Customs Organization (WCO). The purpose of the Convention is to facilitate a uniform international practice, and although individual states are not bound by other countries' classification of a product within the HS nomenclature, it must be assumed that practice in other countries are given considerable weight.”

The Court of Appeal here goes further than Eckhoff in that foreign case law is not just an argument, but an argument of considerable weight. In a recent judgment from the Oslo District Court in F and NBK (Visual Artists Association) against the Ministry of Finance – a case concerning the customs classification of works of art – the Oslo District Court rejected the argument that the Court of Appeal in Hordafør only referred to foreign customs practices and not foreign case law. Instead the court put decisive weight on case law from the CJEU in similar classification matters.

Given the purpose of uniform laws (ensuring international uniformity) and thereby the strength of the presumption principle in interpreting them, it should be uncontroversial to say that foreign case law must be considered an argument of considerable weight when Norwegian court are faced with a similar issue of interpretation. After the decision of the Norwegian Court of Appeal in Hordafør there is now case law in support of such an argument.

156 Author’s translation.
158 Customs/the HS Convention fall outside of EEA law, accordingly reliance on the CJEU is akin to relying on foreign case law, rather than within EEA law where there is a substantial practice of relying of CJEU practice (see also footnote 57).
6.3 Conflict between domestic law and foreign case law

Whilst the use of foreign case law in interpreting uniform law provisions in general should be readily accepted, the issue becomes more complex where there is a conflict between the international precedent set by foreign case law and precedent set in Norwegian case law or where the foreign interpretation conflicts with other parts of Norwegian domestic law. As maybe remembered from the previous section, Eckhoff states that foreign case law is an argument in interpreting uniform laws, but:

“[Foreign case law] is not an unconditionally decisive argument, because there may be applicable factors to the opposite, for instance if the interpretation is unreasonable or if it is in poor harmony with other Norwegian legal rules.”

This approach to foreign case law is in my opinion flawed because it ignores the considerable body of international case law that developed through the 20th-century which gives clear direction to domestic courts to set aside domestic law and precedents where it is necessary to achieve the purpose of international uniformity.

The principle of ensuring international uniformity through interpretation is almost as old as the Hague Rules and was first expressed by the House of Lords in the Stag Line case.

*Stag Line* concerned a cargo of coal to be carried from Swansea to Istanbul onboard the Ixia. The shipowner had fitted the ship with special equipment to reduce fuel consumption. The equipment was not functioning properly and two engineers were on board to remedy the equipment when the ship left Swansea, the intention being that the engineers were to leave with the pilot somewhere off Lundy. The engineers had not finished the necessary work by Lundy, remained on board and was later landed off St. Ives (off the contractual route). Before the ship had returned to the contractual route she stranded.

159 Eckhoff (2001) p. 290 (*author’s translation*).
160 [1932] AC 328
The question before the House of Lords in *Stag Line* was *inter alia* whether the deviation was a “reasonable deviation” under the Hague Rules article IV rule 4. That same question as to what was a “reasonable deviation” had been considered by English courts on numerous occasion prior to the Hague Rules and a key consideration for the House of Lords was accordingly whether the court was bound by the existing common law on the matter (which was still good law from a domestic perspective) or whether they had to set domestic law aside to ensure international uniformity. Lord Macmillan, with whom their Lordships agreed, stated his opinion as follows:

> “It is important to remember that the [Carriage of Goods by Sea] Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interest of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.”

This dictum has later been applied by the House of Lords to the interpretation of other uniform laws. In *Buchanan v Babco* it was applied to the Carriage of Goods by Road Act 1965, enacting the CMR convention, and in *Fothergill v Monarch Airlines Ltd.* it was applied to the Carriage by Air Act 1961, enacting the Warsaw Convention.

The sentiment of Lord Macmillan’s statement in *Stag Line* is not exclusive to the House of Lords (now Supreme Court). Since *Stag Line* the very same principle has been laid down or referred to by the Federal German Supreme Court, the Belgian Cour de Cassation, the

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162 See footnote 66
163 [1981] AC 251
165 *Sauvage, Veuve Tondriau et consorts v Air India Corporation* [1978] ULR I 346
High Court of Australia\textsuperscript{166}, the Supreme Court of Canada\textsuperscript{167} and the New Zealand Supreme Court\textsuperscript{168}. The principle has not been expressly stated or relied upon by the US Supreme Court\textsuperscript{169}, but it has been relied upon by the US Federal Court of Appeal\textsuperscript{170}.

The case before the High Court of Australia in \textit{the Bunga Seroja}\textsuperscript{171} provides an illustrative example of the setting of side of domestic law in deference to international uniformity.

\textit{The Bunga Seroja} concerned ten containers of aluminium coils carried from Australia to Taiwan via Tasmania. Before Tasmania the ship made a stop in Melbourne, in Melbourne the weather forecast warned of gale in the Bass Strait (an area renowned for heavy weather). Despite the forecast the master decided to head for Tasmania after preparing the ship and cargo for “the worst possible weather conditions”. Once in the Bass Strait the ship encounter much heavier weather in a violent storm. In the storm the aluminium coils was dislodged and damaged.

The cargo owner sued for damages and the shipowner raised the “peril of the sea” defence contained in the Hague rules Art. IV rule 2(c) as enacted by the Australian Sea-Carriage of Goods Act 1924. The cargo owner in turn argued that the storm was foreseeable and that the “peril of the sea” defence could not be raised where the peril was foreseeable.

In its submissions regarding the correct construction of “peril of the sea” the cargo side argued \textit{inter alia} that the Hague rules, in Australia, derived its authority from domestic legislation incorporating them into Australian law, and that the Australian High Court accordingly had to construe “peril of the sea” against Australian background law, in this instance the developed Australian common law on contracts of bailment.

\textsuperscript{166} \textit{Shipping Corp. of India Ltd. v Gamlen Chemical Co. (Australasia) Pty. Ltd.} (1980) 147 CLR. 142; and \textit{Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corp. Berhad (the Bunga Seroja)} (1998) 158 ALR 1

\textsuperscript{167} \textit{Dominion Glass Co. Ltd. v the Anglo Indian} 1944 AMC 1407

\textsuperscript{168} \textit{Tasman Orient Line CV v New Zealand China Clays Ltd} (2010) (the \textit{Tasman Pioneer}) [2010] NZSC 37

\textsuperscript{169} Although; see \textit{Norfolk Southern Railway Co. v Kirby} (2004) 543 U.S. 14

\textsuperscript{170} \textit{Sunkist Growers Inc. v Adelaide Shipping Lines Ltd.} 1979 AMC 2787 (9 Cir. 1979), appeal denied to the US Supreme Court.

\textsuperscript{171} See footnote 80.
The High Court of Australia rejected the applicability of Australian domestic law in the interpretation of the Hague rules and further rejected that the storm had been foreseeable and accordingly allowed the shipowner’s “peril of the sea” defence.

In rejecting the cargo owner’s reliance on domestic Australian law, the Court explained:

“The approach of this Court to the construction of an international legal regime such as that found in the Hague Rules must conform to settled principle. Reflecting on the history and purposes of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts.”

In construing texts such as the Hague Rules, this Court, to the greatest extent possible, should prefer the construction which is most consistent with that which has attracted general international support rather than one which represents only a local or minority opinion. That is a reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected in, or identical to, the equivalent law governing carriers’ liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition.

Two important elements should be observed from this dicta; first, the dictum is intended for uniform laws in general, not limited to the Hague Rules, as per “an international legal regime such as... the Hague Rules”. The second observation is that the principle is not absolute, but “to the greatest extent possible”. The High Court does not elaborate on instance that might fall outside of scope, but it is clear that domestic background law cannot consti-
tute a reason for abandoning the construction that has attracted general international ac-
ceptance\textsuperscript{174}.

\section*{6.4 Conflicting foreign case law}

It is important to emphasise that it is not a given that foreign case law gives a clear answer in one direction. It may be that there are considerable disagreements between jurisdictions. If one interpretation is generally accepted internationally, that interpretation must be followed by Norwegian courts in the interest of uniformity unless there are special reasons not too\textsuperscript{175}.

If there is general disagreement as to interpretation internationally the courts are “thrown back to their own resources”\textsuperscript{176}. For instance, in \textit{Buchanan v Babco} – a case concerning the interpretation of the CMR – the House of Lords considered that courts in six signatory states had produced twelve different interpretations of the same provision\textsuperscript{177} and that the English court therefore had to rely on their own methods of interpretation and broad principles\textsuperscript{178}. I see no reason why Norwegian courts likewise should not resort to their own methods of interpretation where there is general disagreement between foreign courts.

From the international body of case law and theory considered above, certain considerations may be utilised to distinguish foreign case law in terms of their relative weight when interpreting a uniform law provision (in no particular order):

\begin{itemize}
  \item[i.] The weight of the decision within its own jurisdiction\textsuperscript{179} (\textit{stare decisis}), meaning; to what extent is the other courts of the jurisdiction bound by it.
\end{itemize}

\textsuperscript{174} See Lødrup (1967) p. 104 to the same effect.
\textsuperscript{175} Lødrup (1967) p. 104 (does not expand on such special reasons).
\textsuperscript{176} Buchanan & Co. v Babco Forwarding & Shipping Ltd. [1978] AC 141 at 161.
\textsuperscript{177} Ibid. at 153.
\textsuperscript{178} Ibid. at 161
\textsuperscript{179} Skoghøy (2007) p. 570 and Lødrup (1966) p. 71
This consideration admittedly creates a bias towards common law jurisdictions where the decisions of a court are binding on itself and all lower courts. This would entail that for instance a decision of the English High Court may carry more weight than a decision from the French Cour de Cassation. Whilst this at first glance may appear strange, a Norwegian court should be reluctant to give decisive weight to a judgement that would not even be binding on lower courts in its own jurisdiction, as would be the case with the Cour de Cassation, cf. article 5 of the French Civil Code that expressly prohibits any binding effect on other courts.

ii. The proximity of the (domestic) enactment provision considered by the court to the original convention text. A decision that considers the original uniform law text will carry greater weight than a decision which turns on a domestic enactment of the uniform law which has rewritten the original text (greater discrepancy, lesser weight). This consideration is based on the near universal acceptance of the detrimental effect discrepancies in text may have on uniform interpretation.

iii. The reliance on, and analysis of, the convention text and its legislative history. Thorough analysis of the convention text, and legislative history, lends a decision greater weight as they are common sources amongst all contracting states.

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181 In its capacity as a court of first instance.
182 The French Supreme Court.
183 See also Tetley (2004) p. 16 and Lødrup (1966) p. 71
185 As per Viscount Simonds – in rejecting of the judgement of the Court of Appeal – in the Muncaster Castle at p. 836.
iv. Decisions pre-dating the uniform law, and decisions that rely on pre-dated, precedents carry less weight. Unless it is clear that the uniform law did not intend to alter the legal position on the matter in question.

v. A decision that reflects a broader international view of the issue in dispute will carry more weight than a decision which reflects only a local or minority opinion. A decision that considers the position of courts in other jurisdictions will accordingly carry favour. A decision that turns on domestic law will carry less favour.

vi. The general strength of the arguments in favour of the chosen solution.

vii. A decision which entails an unreasonable or absurd result may be disregarded.

The above list is intended as a non-exhaustive overview of considerations that have been deemed relevant by courts and academics when considering the foreign case law, and must be subjected to a broad discretionary consideration by the court with international uniformity as its overriding principle.

International disagreement on the interpretation of a provision should, in any case, be no hindrance for examining the body of international case law however, as emphasised by the current justice of the (English) Supreme Court, Lord Mance:

“Even in cases where no single direction can be discerned in the international jurisprudence, the very exercise of examining foreign cases and material and analysing the considerations

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186 As per Lord Macmillan in *Stag Line*.
187 Cf. *the Muncaster Castle*.
188 Cf. *the Bunga Seroja* (Australia); *the Rafaela S* (England (CoA)); see also Lødrup (1966) p. 104.
190 Skoghøy (2007) p. 571
191 Eckhoff (2001) p. 209; see also the Vienna Convention article 32(b).
which have been weighed with foreign courts may have a large contribution to make to the development and adoption of sensible solutions.”

Norwegian courts would do well in heeding such an approach to foreign case law. It seems Norwegian academics more readily take on board foreign opinion, than does the courts. For instance, in terms of the Hague Rules, the last full treatment of the Bill of Lading Act 1938 was Sejersted’s commentary in 1976, there he utilises a considerable number of foreign cases in his treatment of the subject. Similarly, Borchsenius’ commentary on the nautical fault exemption in the mid-1950s is an exceptional example of a thorough treatment of foreign law in relation to a Norwegian domestic provision. In case law however, the judgement in the Sunny Lady remains a lonely example of the Norwegian Supreme Court emphasising (albeit very briefly) foreign (non-Scandinavian) case law in its interpretation of a uniform law provision.

6.5 Scandinavian uniformity

Whilst Norwegian courts are reluctant to consider foreign case law, such reluctance does not extend to case law from the other Scandinavian jurisdictions.

The natural reason for this is the close collaboration between the Scandinavian countries in a number of private law areas. For instance the NMC, in its entirety, is formed in collaboration with the Swedish, Danish and Finnish maritime committees and closely resembles the respective Acts of those countries. Accordingly, it may be said that the NMC Chapter 13 (which enacts the Hague Rules) enacts an international uniform law within a Scandinavian uniform law.

192 Mance (2001) at p. 422.
193 Sejersted (1976)
194 Borchsenius (1955)
195 Scandinavia here referring to; Denmark, Finland, Norway and Sweden.
Usually, the Scandinavian collaboration does not take the form of a convention that the Scandinavian states sign; rather it is a more informal collaboration. Only where the parties consider the need for uniformity so strong that identical legislation is needed will the countries enter into a convention. The Convention between Norway, Denmark, Finland, Iceland and Sweden on the Recognition and Enforcement of Private Law Judgments 1932 which is enacted in the Enforcement and Recognition of Nordic Private Law Judgements Act 1977, provides an example of an instance where the Scandinavian countries considered the need for uniformity so strong they entered into a convention.

It is only in the latter instances – where the countries enter into a convention – where Norway will be under an international law obligation towards the other Scandinavian countries in terms of uniformity. That is not to say that Scandinavian case law is without relevance in the interpretation of provisions that has resulted from the more informal collaboration. There is a long tradition for looking to the other Scandinavian countries when interpreting such provisions as the collaboration in itself must be seen as an expression of an intention of uniformity.

It remains a paradox however that Norwegian courts looks to Scandinavian jurisdictions which they strictly speaking owe no obligation, but ignores international jurisdictions which they do owe an obligation under uniform law conventions. That said; case law from other Scandinavian jurisdictions may of course be relevant foreign case law. For instance, the other Scandinavian countries have also ratified the Hague Rules, under the Hague Rules their body of case law becomes relevant sources for interpretation just like jurisprudence from other contracting states. But Scandinavian case law may be said to provide only a local opinion. If one relies solely on local opinion, there is a risk that the courts may get a limited and slanted view of the position taken on a given issue internationally. In the inter-

\[\text{196} \text{ Eckhoff (2001) p. 287.} \]
\[\text{197} \text{ Skoghøy (2007) p. 570.} \]
\[\text{198} \text{ Skoghøy (2007) p. 570-571} \]
est of uniformity it is therefore important to look not only to the other Scandinavian jurisdic-
tions, but also beyond.

An interesting issue arises where there may be a contradiction between the Scandinavian
legal position on a uniform law issue and the position taken in other jurisdictions. Støen\(^{199}\)
identifies such a possible contradiction in a recent article discussing the House of Lords
decision in *the Muncaster Castle*\(^{200}\) in light of Scandinavian law.

*The Muncaster Castle* concerned whether a carrier was liable for cargo damage caused by a
latent defect of the ship which in turn had been caused by the negligence of a worker at a
yard where the ship had been repaired. The latent defect had gone unnoticed in inspections
by the carrier and Class. The question before the House of Lords was whether the scope of
the carriers due diligence under Hague Rules article III rule 1 in making the ship seaworthy
extended to the negligent yard worker. If so, the carrier would be liable due to failure in
making the ship seaworthy.

The House of Lords concluded that the scope of the carrier’s due diligence requirement
extended to the negligent yard worker.

After a thorough analysis of both *the Muncaster Castle* and Scandinavian law, Støen\(^{201}\)
concludes that under Scandinavian law the scope of the carrier’s due diligence would not
have extended to the yard worker, citing *inter alia* the decision of the Finnish Supreme
Court in *M/S Tuulikki*\(^{202}\) to the opposite of *the Muncaster Castle*.

From an interpretation perspective it is interesting to consider the relative weighting of two
foreign judgements to the opposite where one of the judgements is Scandinavian.

\(^{199}\) Støen (2016)
\(^{200}\) [1960] AC
\(^{201}\) Støen (2016) p. 89-90
\(^{202}\) ND 1979 s. 383
In my opinion there is no obligation on Norwegian courts to give particular preference to Scandinavian judgements in a scenario such as the Muncaster Castle. Norway is, through the Hague Rules, under an obligation aimed at international uniformity. If the Scandinavian collaboration was to be interpreted as necessitating a uniform view on an already uniform obligation, that would render the underlying international obligation pointless. In other words, a Scandinavian preference would be contrary to the purpose of international uniformity.

Then we are left with two Supreme Court decisions which prima facie carry equal weight. As outlined above in 6.4, the two decisions may then be considered on a range of factors such as: the proximity of the considered provision to the original convention text, the relative harmony with the conventions legislative history and travaux préparatoires and whether the decision reflects a wider international approach or just a local or minority opinion. As with the consideration of all case law, the depth of analysis and the strength of the arguments relied upon in concluding on the matter are also central to the weight of the respective judgements. Performing such a comparative analysis of these two judgements and reaching a conclusion is however beyond the scope of this paper.

6.6 Uniformity through interpretation: an implied obligation?

Whereas the presumption principle will align the legislature’s domestic enactment with its international obligations and international customary law will hold interpretation to the convention text and legislative history, it begs the question; on what legal basis may foreign case law become precedents that Norwegian courts must heed?

In discussing the legal basis for the use of foreign case law Lødrup argues that where many foreign courts have followed a certain practice, Norwegian courts can only diverge where there is particularly strong reason to do so\textsuperscript{204}. He emphasises in his conclusion however that Norwegian courts are in fact under no international law obligation to utilise foreign case law\textsuperscript{205}.

Whilst the customary international law codified in the Vienna Convention clearly does not extend to the regard for foreign case law there is a strong argument for the proposition that due regard to foreign case law is an obligation implied in uniform laws, stemming from its purpose of international uniformity. As stated by Skoghøy:

\begin{quote}
“Even if it is not expressly provided, it will in my opinion for conventions that aim to render uniform rules in a particular area of law, easily be implied an obligation to the effect that one in interpreting the convention must have due regard of legal developments in other contracting states, as it otherwise could become difficult to achieve the harmonization objective that underlies the Convention.”\textsuperscript{206}
\end{quote}

I would argue that the long standing international practice of relying on foreign case law in interpreting uniform laws, outlined in the previous sections of this chapter, cements the argument that there is an implied obligation to give foreign case law due regard, and that Norwegian courts are equally bound by that obligation\textsuperscript{207}.

\begin{flushright}
\textsuperscript{204} Lødrup (1967) p. 104
\textsuperscript{205} Ibid.
\textsuperscript{206} Skoghøy (2007) p. 569 (author’s translation)
\textsuperscript{207} The letter from the Norwegian MoJ included in Innst. O. II 1938 at p. 3-4 (set out on p. 16 of this thesis) would, discusses the reliance on foreign case law in relation to the Hague Rules, would support the view that this was an obligation already from the outset.
\end{flushright}
6.7 Practical challenges

Eckhoff states that in order for domestic courts to rely on foreign case law it is necessary for there to have been made comparative analysis in legal theory. This because carrying out such analysis would usually be beyond what one can reasonably expect of the parties and the courts\textsuperscript{208}.

It is of course more difficult for the parties and the courts to get orientated in a landscape consisting of international sources rather than the familiar domestic sources that they use every day. I take issue however, with the notion that such practical difficulties entail that domestic courts cannot be expected to consider foreign case law\textsuperscript{209}.

In the latter half of the 20\textsuperscript{th} century active steps were taken to ease the availability of uniform case law to domestic courts, primarily through the Uniform Law Review (which is edited by, but not limited to uniform laws from, the UNIDROIT). Further, in terms of transportation law, European Transport Law (ETL) also provides substantial analysis of foreign case law in the transportation law area. There is also a considerable number of newsletters and other circulars from insurance companies, law firms and other industry actors that, at least on a primer-level, may shed light on the developing case law in other countries.

6.8 Conclusion

Norwegian courts appear reluctant to consider foreign case law when interpreting uniform laws. This is both unfortunate from a uniformity aspect and contrary to the long and sub-

\textsuperscript{208} Eckhoff (2001) p. 290-291, see also Oftedal Broch (1968) p.634.
\textsuperscript{209} See Solvang (2009) p. 70 \textit{et seq.} for a discussion of such use of foreign case law in terms of contract interpretation; also Solvang (2013).
stantial practice of courts in other jurisdictions that regularly rely on uniform law interpretations of other courts. Whilst it understandably is easier to look to the other Scandinavian countries that we collaborate with and share a common legal tradition, the Scandinavian view only represents a regional opinion and it is therefore important to look beyond to other signatory jurisdictions. Indeed, we are under an obligation to do so.

7 CONCLUSION

The fundamental purpose of this thesis has been to describe the central tenets of uniform law interpretation and their basis, from a Norwegian perspective, utilising the Hague Rules as the primary reference for illustration.

The thread of the discussion on uniform laws is their overriding purpose of creating international uniformity on a given legal issue. In essence, it is this purpose that renders the rules on uniform law interpretation different from other conventions and the usual interpretation of domestic law. In short, interpretation of uniform laws must be consensus driven, actively seeking international uniformity.

The discussion on the enactment of uniform laws into domestic law has shown the dangers of transformations of uniform laws that create significant differences in wording and structure between the domestic and international text. These differences in text may in turn form the basis for differences in interpretation contrary to the purpose of uniformity. Accordingly, uniform laws should be given an active transformation into Norwegian law containing the wording and structure of the uniform law to the greatest extent possible.

Where a difference between the Norwegian enactment and the uniform law occurs, the presumption principle however gives the courts a basis for forcing alignment through interpretation. In other words, the wording of the domestic provision itself carries little to no weight.
As further laid out in chapter 5 and 6 the convention text itself and its *travaux préparatoires* as well as case law from other contracting jurisdiction will provide the courts with an important means of interpretation as well as aiding in *de facto* uniform application of the rules internationally. Customary international law provides the legal basis for utilising the convention text and its legislative history in the interpretation of uniform laws. The obligation to consider foreign case law does not stem from public international law however, but is rather an implied obligation stemming from the purpose of uniformity that underpins uniform laws.

It may be noted that this paper, whilst highlighting the absence of legislative history and foreign case law in Norwegian case law, makes no specific mention of a Norwegian authority that is in conflict with other international authorities. But that is rather beside the point. The point is to highlight the need for a more conscious approach to interpretation and international uniformity where Norway has ratified a uniform law and the instrumental role of domestic courts in ensuring that the uniform law fulfils its purpose to the greatest extent possible.

For a *tour de force* display of uniform law interpretation, I would recommend as further reading the judgement of Lord Justice Rix in *the Rafael S* – a case concerning whether a straight bill of lading (a bill of lading consigned to a named consignee, i.e. it is non-transferrable) fell within the scope of the Hague Rules. In his judgement, Lord Justice Rix examined the issue by comprehensively setting out the legislative history of the Hague

210 That said; the judgement of the Norwegian Supreme Court in Rt. 1995 p. 486 (CMR case regarding whether gross negligence is “equivalent to wilful misconduct” in art. 29 (as enacted by the Norwegian Road Carriage Act § 38)) is in clear contradiction with German and French case law (but in line with Belgian practice), see Clark (1987) at p. 157, (in my opinion, given the absence of gross negligence in English common law (e.g. *Wilson v Brett*), the same result as German and French practice would be rendered in England; see also *Denfleet International v TNT Global* and *Chitty* para. 36-131); neither is it unlikely that the Norwegian Supreme Court would have come to a different result in *the Sunny Lady* had it taken into consideration the views of the House of Lords on the meaning of “the management of the ship” in *the Canadian Highlander*, the Australian decision in *the Novoaltaisk* and the US Supreme Court in *the Germanic*, or that other Norwegian judgements on uniform laws would not have benefitted from a discussion on similar decisions in other jurisdictions; see also chapter 3.5 above.

211 [2004] QB 702
Rules and detailing the *travaux préparatoires* before turning to the treatment of the issue by foreign courts in other jurisdictions. He then concluded, on those authorities rather than English common or statutory law\textsuperscript{212}, that a straight bill of lading fell within the scope of the Hague Rules\textsuperscript{213}.

\textsuperscript{212} “Whatever, the history of the phrase [straight bill of lading] in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore.” at pp. 751-752.

\textsuperscript{213} Upheld on appeal, [2005] 2 AC 423.
## 8 TABLE OF REFERENCE

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### 8.2 Conventions

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NMC 1994  Lov om sjøfarten 1994

Road Carriage Act  Lov om vegfraktavtaler 1974

Harter Act, the  Harter Act 1893, ch. 105, 27 Stat. 445 (USA)

8.4 Preparatory works and guides

Innst. O. II. (1938)  Innst. O. II. (1938)


NOU 1972:16  NOU 1972:11 Gjennomføring av lovkonvensjoner i norsk rett


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8.5 Case law

8.5.1 Norwegian case law

Norwegian Supreme Court:

*D/S Atna*  
Rt. 1929 p. 1081

*Finanager I*  
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*Finanager II*  
Rt. 2005 p. 1365

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*Sunny Lady, the*  
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*S/S Far*  
Rt. 1957 p. 1000

Norwegian Court of Appeal:

*Hordafór*  
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Norwegian District Courts:

14-143774TVI-OTIR  
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Norwegian arbitration awards:

*Arica*  
ND 1983.309

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8.5.2 Foreign case law

8.5.2.1 American case law

U.S. Supreme Court:

*Itel v Huddleston*  

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*Racer*  
Mitchell v. Trawler Racer, 362 US 539 (1960) (U.S. Supreme Court)

*Silvia, the*  
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U.S. Federal Court of Appeal:

*Sunkist v Adelaide*  
Sunkist Growers Inc. v Adelaide Shipping Lines Ltd. 1979 AMC 2787 (U.S. Federal Court of Appeal (9 Circuit))
8.5.2.2 English case law

**Supreme Court (formerly House of Lords):**

*Buchanan v Babco* Buchanan & Co. v Babco Forwarding & Shipping Ltd. [1978] AC 141

*Canadian Highlander, the* Gosse Millard Ltd v Canadian Government Merchant Marine Ltd [1959] A.C. 589

*Fothergill v Monarch Airlines* Fothergill v Monarch Airlines Ltd. [1981] AC 251

*Giannis N.K., the* Effort Shipping Company Limited v. Linden Management SA and Others [1998] 1 Lloyd’s Rep. 337

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*Stag Line* Stag Line Ltd. v Foscolo, Mango & Co [1932] AC 328

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Court of Appeal:

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*Wilson v Brett* Wilson v Brett (1843) 152 ER 737

8.5.2.3 Other common law jurisdictions

*Anglo Indian, the* Dominion Glass Co. Ltd. v the Anglo Indian (1944) AMC 1407 (Canadian Supreme Court)

*Bunga Seroja, the* Great China Metal Industries Co. Ltd. v Malaysian International Shipping Corp. Berhad (1998) 158 ALR 1 (High Court of Australia)

*Gamlen* Shipping Corp. of India Ltd. v Gamlen Chemical Co. (Australasia) Pty. Ltd. (1980) 147 CLR. 142 (High Court of Australia)

*Tasman Pioneer, the* Tasman Orient Line CV v New Zealand China Clays Ltd [2010] NZSC 37 (New Zealand Supreme Court)
8.5.2.4 Other European jurisdictions

*M/S Tuulikki*  
ND 1979 s. 383 (Finnish Supreme Court)

*B.G.H.Z. 52, 220*  
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*Sauvage v Air India*  
Sauvage, Veuve Tondriau et consorts v Air India Corporation [1978] ULR I 346 (Belgian Cour de Cassation)